A

Desacorp Sdn Bhd v Wong Hou Lianq & Ors and another appeal

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(NCvC)-1799–11 OF 2020 AND Q-02(NCvC)(W)-1800–11 OF 2020

AZIZAH NAWAWI, SEE MEE CHUN AND MOHAMED ZAINI JJCA

29 FEBRUARY 2024

C

Companies and Corporations — Directors — Duties and liabilities — Respondents' claim for recovery of monies due from performance of work was allowed while appellants' counterclaim for breach of fiduciary duties was dismissed — Whether respondents entitled to claims — Whether there was ratification and estoppel — Whether there was breach of director's fiduciary duty under s 132 of Companies Act 1965 — Whether appellants' counterclaim ought to be allowed — Companies Act 1965 ss 131 & 132

D

E

Desacorp Sdn Bhd ('Desacorp') was a wholly owned subsidiary of WTK Realty which was a company owned and controlled by members of the Wong family. The directors of Desacorp were the late Wong Kie Nie ('WKN'), Wong Hou Liang ('Neil'), Mimi Wong ('Mimi'), Wong Kie Yik ('WKY') who was WKN's brother and his son Patrick Wong ('Patrick'). The late WKN's family

F

comprised of his wife Kathryn Ma ('Kathryn') and two children, Neil and Mimi. The directors of Aspire Summit Sdn Bhd ('Aspire') were Neil and Kathryn and they each hold 50% of the shares. The directors of Demeter Resources Sdn Bhd ('Demeter') were Neil and Kathryn where Neil held 80% of the shares with Kathryn holding the balance 20% shares. On 10 April 2012, an

G

agreement was entered into between Desacorp and Aspire ('the Aspire agreement'). Aspire was appointed as the contractor to develop two parcels of Desacorp's land ('the land') as an oil palm plantation. On 6 August 2013, Aspire issued a letter to terminate the Aspire agreement. On 31 July 2012, an agreement was entered into between Desacorp and Demeter ('the Demeter

H

agreement'). Demeter was appointed as a consultant to provide consultancy management services and harvesting operations for the land. On 7 August 2013 the Demeter agreement was terminated by Demeter. Aspire and Demeter then filed their High Court ('HC') claims for a declaration that the two agreements entered into were terminated, the recovery of monies for work

I

performed pursuant to the two agreements and alternatively on quantum meruit pursuant to s 71 of Contracts Act 1950. Desacorp disputed the claims and counterclaimed for a declaration that the Aspire and Demeter agreements were entered in breach of ss 131(1), (5), (7A) and 132(1) and (1A) of the Companies Act 1965 ('the CA') and an order that the agreements be rescinded

and/or declared null and void. Desacorp further counterclaimed against Neil and Kathryn (as WKN's representative) for breach of fiduciary duty and statutory duties as directors of Desacorp and for a full account of all benefits, income and profits in connection with the action and breach of fiduciary duties. Desacorp contended that soon after the Aspire agreement was entered into, a contractor Menyan Enterprise ('Menyan') was terminated. Aspire then re-appointed Menyan as a subcontractor at a contract rate that was 25% higher than the contract rates charged by Desacorp's former contractors. Another subcontractor, Fhung Seng Company was also appointed at the higher 25% contract rate. It was next contended that Desacorp had to pay Demeter's marked up monthly management fees ie RM250,000 per month instead of RM50,000 from October 2012 onwards. It was submitted that the higher contract rate in the Aspire agreement and the marked-up management fee in the Demeter agreement led to higher costs. The HC found that although Neil and WKN had breached their fiduciary duties under s 131 of the CA in failing to disclose their interest and there was a conflict of interest situation, when the Aspire and Demeter agreements were entered into, nevertheless there was no breach of fiduciary duties under s 132 of the CA. The HC allowed the claims of Aspire and Demeter and dismissed the counterclaims of Desacorp. Hence, these appeals.

Held, dismissing the appeals:

(1) The invoices and statement of accounts issued to Desacorp were premised on the respective agreements. Payments were made but were stopped upon the disputes arising. Aspire and Demeter had proven that work had been done and payment was not made leading to the termination. They were thus entitled to be paid their claims (see paras 31, 33 & 36).

(2) A breach of s 131 of the CA did not automatically amount to a breach of s 132 of the CA. Both sections were separate and distinct relating to a director's statutory duties. Non-disclosure or a conflict of interest which was found to be a breach of s 131 of the CA could not, without more, amount to a breach of fiduciary duty under s 132 of the CA (see paras 44 & 47).

(3) The failure of Neil and WKN to disclose their interest in the agreements rendered the agreements voidable at the option of Desacorp. The words 'voidable at the instance of the company' in s 131(7B) of the CA required Desacorp to void the Aspire and Demeter agreements. However, it elected not to do so, such that the agreements were taken to be ratified. When the Aspire and Demeter agreements were provided, it could be said that WKY would have known of Neil's and WKN's interests in the two agreements, by 13 May 2013, which ought to have prompted some action. There was no action towards voiding the two agreements.

Desacorp had evinced no intention to terminate the agreements and business went on as usual. Desacorp ought to have acted to void what was considered to be disadvantageous agreements (see paras 51, 54, 60–61, 63 & 65).

(4) There were documents ie drawdown letters and cheques that showed Desacorp and its directors had actual knowledge that Aspire and Demeter were the contractors of Desacorp. Desacorp was estopped from challenging the validity of the Aspire and Demeter agreements when it was aware of the agreements early on. This knowledge pre-dated 13 May 2013 when WKY had requested for and was provided copies of the Aspire and Demeter agreements (see paras 67 & 73).

(5) On the re-appointment of Menyan, the explanation by PW4 was reasonable and there really was no sinister reason behind it. On the contract rates, given that there was no evidence from Desacorp to challenge the evidence that these were then the prevailing market rates, Neil and WKN did not breach their fiduciary duties. Regarding Demeter's marked up management fees, the scope of work was different. The Demeter agreement showed the different and extensive management services to be provided by Demeter as compared to that of WTK Management which was essentially that of an administration and shared cost centre. There was also no evidence otherwise by Desacorp on the market rate. Therefore, it was not a breach of directors' fiduciary duties. Given the higher contract rate and management fee had been sufficiently explained, the additional costs similarly could not amount to a breach of fiduciary duty (see paras 76, 79, 81, 83, 85 & 87).

(6) The acts ie higher contract rate, marked up management fee and additional costs did not constitute a breach of director's fiduciary duty under s 132 of the CA. The objective could still be as ascertained where the condition of the oil palm plantation showed a need for the Aspire and Demeter agreements to be entered into such that the agreements were in the best interests of Desacorp. Explanations too had been proffered on the basis of the higher contract and management fees (see paras 104–105).

(7) Clause 1(g) of the Aspire agreement provided that the contract was not to be subcontracted without the prior written permission of Desacorp. Any breach of the provision in cl 1(g) of the Aspire agreement entitled Desacorp to terminate the agreement, which it did not. Instead, it chose the route of ss 131 and 132 of the CA. Next, the fact that the agreements were entered without formal approval from Desacorp's Board did not negate the fact that Desacorp, WKY and Patrick were aware of the Aspire and Demeter agreements and the interest of Neil and WKN interest. As the respondents had proved their claims; that there was no breach of s 132

of the CA; that there had been ratification and that estoppel applied, the appellants' counterclaims ought to fail (see paras 106–109).

[Bahasa Malaysia summary

Desacorp Sdn Bhd ('Desacorp') ialah anak syarikat milik penuh WTK Realty yang merupakan syarikat yang dimiliki dan dikawal oleh ahli keluarga Wong. Pengarah Desacorp ialah mendiang Wong Kie Nie ('WKN'), Wong Hou Liang ('Neil'), Mimi Wong ('Mimi'), Wong Kie Yik ('WKY') yang merupakan abang WKN dan anaknya Patrick Wong ('Patrick'). Keluarga mendiang WKN terdiri daripada isterinya Kathryn Ma ('Kathryn') dan dua anak, Neil dan Mimi. Pengarah Aspire Summit Sdn Bhd ('Aspire') ialah Neil dan Kathryn dan mereka masing-masing memegang 50% saham. Pengarah Demeter Resources Sdn Bhd ('Demeter') ialah Neil dan Kathryn di mana Neil memegang 80% saham dengan Kathryn memegang baki 20% saham. Pada 10 April 2012, satu perjanjian telah dimeterai antara Desacorp dan Aspire ('perjanjian Aspire'). Aspire dilantik sebagai kontraktor untuk membangunkan dua bidang tanah Desacorp ('tanah') sebagai ladang kelapa sawit. Pada 6 Ogos 2013, Aspire mengeluarkan surat untuk menamatkan perjanjian Aspire. Pada 31 Julai 2012, satu perjanjian telah dimeterai antara Desacorp dan Demeter ('perjanjian Demeter'). Demeter dilantik sebagai perunding untuk menyediakan perkhidmatan pengurusan perundingan dan operasi penuaian tanah. Pada 7 Ogos 2013 perjanjian Demeter telah ditamatkan oleh Demeter. Aspire dan Demeter kemudiannya memfailkan tuntutan Mahkamah Tinggi ('MT') mereka untuk pengisytiharan bahawa kedua-dua perjanjian yang dimeterai telah ditamatkan, mendapatkan semula wang untuk kerja yang dilakukan menurut kedua-dua perjanjian dan secara alternatif pada quantum meruit menurut s 71 Akta Kontrak 1950. Desacorp mempertikaikan tuntutan tersebut dan menuntut balas bagi pengisytiharan bahawa perjanjian Aspire dan Demeter telah dimeterai dengan melanggar ss 131(1), (5), (7A) dan 132(1) dan (1A) Akta Syarikat 1965 ('AS') dan memerintahkan supaya perjanjian itu dibatalkan dan/atau diisytiharkan terbatal dan tidak sah. Desacorp seterusnya menuntut balas terhadap Neil dan Kathryn (sebagai wakil WKN) kerana melanggar kewajipan fidusiari dan kewajipan berkanun sebagai pengarah Desacorp dan untuk akaun penuh semua faedah, pendapatan dan keuntungan berkaitan dengan tindakan dan pelanggaran kewajipan fidusiari. Desacorp menegaskan bahawa tidak lama selepas perjanjian Aspire dimeterai, kontraktor Menyan Enterprise ('Menyan') telah ditamatkan perkhidmatan. Aspire kemudiannya melantik semula Menyan sebagai subkontraktor pada kadar kontrak yang 25% lebih tinggi daripada kadar kontrak yang dikenakan oleh bekas kontraktor Desacorp. Subkontraktor lain, Syarikat Fhung Seng turut dilantik pada kadar kontrak 25% yang lebih tinggi. Seterusnya dipertikaikan bahawa Desacorp perlu membayar yuran pengurusan bulanan tambahan Demeter iaitu RM250,000 sebulan dan bukannya RM50,000 mulai Oktober 2012 dan seterusnya. Telah dihujahkan bahawa kadar kontrak yang lebih tinggi dalam perjanjian Aspire dan yuran pengurusan tambahan dalam

perjanjian Demeter membawa kepada kos yang lebih tinggi. MT mendapati bahawa walaupun Neil dan WKN telah melanggar kewajipan fidusiari mereka di bawah s 131 AS kerana gagal mendedahkan kepentingan mereka dan terdapat situasi konflik kepentingan, apabila perjanjian Aspire dan Demeter dimeterai, namun tiada pelanggaran tugas fidusiari di bawah s 132 AS. MT membenarkan tuntutan Aspire dan Demeter dan menolak tuntutan balas Desacorp. Oleh itu, rayuan-rayuan ini.

Diputuskan, menolak rayuan-rayuan:

(1) Invois dan penyata akaun yang dikeluarkan kepada Desacorp adalah berdasarkan perjanjian masing-masing. Pembayaran telah dibuat tetapi dihentikan apabila pertikaian timbul. Aspire dan Demeter telah membuktikan bahawa kerja telah dilakukan dan pembayaran tidak dibuat yang membawa kepada penamatan. Oleh itu, mereka berhak untuk dibayar tuntutan mereka (lihat perenggan 31, 33 & 36).

(2) Pelanggaran s 131 AS tidak secara automatik berjumlah pelanggaran s 132 AS. Kedua-dua bahagian adalah berasingan dan berbeza berkaitan dengan tugas berkanun pengarah. Ketiadaan pendedahan atau konflik kepentingan yang didapati melanggar s 131 AS tidak boleh, tanpa lebih, menyamai pelanggaran kewajipan fidusiari di bawah s 132 AS (lihat perenggan 44 & 47).

(3) Kegagalan Neil dan WKN untuk mendedahkan kepentingan mereka dalam perjanjian menyebabkan perjanjian itu terbatal atas pilihan Desacorp. Perkataan 'boleh dibatalkan atas permintaan syarikat' dalam s 131(7B) AS memerlukan Desacorp untuk membatalkan perjanjian Aspire dan Demeter. Walau bagaimanapun, ia memilih untuk tidak berbuat demikian, sehingga perjanjian itu diambil untuk diratifikasikan. Apabila perjanjian Aspire dan Demeter disediakan, boleh dikatakan bahawa WKY mengetahui kepentingan Neil dan WKN dalam kedua-dua perjanjian itu, menjelang 13 Mei 2013, yang sepatutnya menyebabkan beberapa tindakan. Tiada tindakan untuk membatalkan kedua-dua perjanjian itu. Desacorp telah membuktikan tiada niat untuk menamatkan perjanjian dan perniagaan berjalan seperti biasa. Desacorp sepatutnya bertindak untuk membatalkan apa yang dianggap sebagai perjanjian yang merugikan (lihat perenggan 51, 54, 60–61, 63 & 65).

(4) Terdapat dokumen iaitu surat pengeluaran dan cek yang menunjukkan Desacorp dan pengarahnya mempunyai pengetahuan sebenar bahawa Aspire dan Demeter adalah kontraktor Desacorp. Desacorp telah dihalang daripada mencabar kesahihan perjanjian Aspire dan Demeter apabila ia menyedari perjanjian itu sejak awal. Pengetahuan ini bertarikh 13 Mei 2013 apabila WKY telah meminta dan diberikan salinan perjanjian Aspire dan Demeter (lihat perenggan 67 & 73).

(5) Mengenai pelantikan semula Menyan, penjelasan PW4 adalah munasabah dan tidak ada sebab jahat di sebaliknya. Mengenai kadar kontrak, memandangkan tiada keterangan daripada Desacorp untuk mencabar keterangan bahawa ini adalah kadar pasaran semasa, Neil dan WKN tidak melanggar kewajipan fidusiari mereka. Mengenai yuran pengurusan tambahan Demeter, skop kerja adalah berbeza. Perjanjian Demeter menunjukkan perkhidmatan pengurusan yang berbeza dan meluas yang akan disediakan oleh Demeter berbanding dengan Pengurusan WTK yang pada asasnya merupakan pusat pentadbiran dan kos bersama. Juga tiada keterangan sebaliknya oleh Desacorp mengenai kadar pasaran. Oleh itu, ia bukan pelanggaran kewajipan fidusiari pengarah. Memandangkan kadar kontrak yang lebih tinggi dan yuran pengurusan telah diterangkan dengan secukupnya, kos tambahan juga tidak boleh dianggap sebagai pelanggaran kewajipan fidusiari (lihat perenggan 76, 79, 81, 83, 85 & 87).

(6) Tindakan itu iaitu kadar kontrak yang lebih tinggi, yuran pengurusan tambahan dan kos tambahan bukan merupakan pelanggaran kewajipan fidusiari pengarah di bawah s 132 AS. Objektifnya masih boleh dipastikan di mana keadaan ladang kelapa sawit menunjukkan keperluan untuk perjanjian Aspire dan Demeter dimeterai di mana perjanjian itu demi kepentingan terbaik Desacorp. Penjelasan juga telah diberikan berkenaan kontrak dan yuran pengurusan yang lebih tinggi (lihat perenggan 104–105).

(7) Klausa 1(g) perjanjian Aspire menyatakan bahawa kontrak itu tidak boleh disubkontrakkan tanpa kebenaran bertulis terlebih dahulu daripada Desacorp. Sebarang pelanggaran peruntukan dalam klausa 1(g) perjanjian Aspire memberi hak Desacorp untuk menamatkan perjanjian, yang tidak dilakukan. Sebaliknya, ia memilih laluan ss 131 dan 132 AS. Seterusnya, hakikat bahawa perjanjian itu dimeterai tanpa kelulusan rasmi daripada Lembaga Pengarah Desacorp tidak menafikan fakta bahawa Desacorp, WKY dan Patrick menyedari perjanjian Aspire dan Demeter serta kepentingan Neil dan WKN. Memandangkan responden telah membuktikan dakwaan mereka; bahawa tiada pelanggaran s 132 AS; bahawa terdapat ratifikasi dan estoppel terpakai, tuntutan balas perayu sepatutnya gagal (lihat perenggan 106–109).]

Cases referred to

Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors [1999] 3 MLJ 262; [1999] 7 CLJ 1, HC (refd)

Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & Ors and other appeals [2020] 3 MLJ 415, CA (refd)

Hely-Hutchinson v Brayhead Ltd and another [1967] 3 All ER 98, CA (refd)

Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors [1999] 5 MLJ 421, HC (refd)

A *Tan Sri Dato' Tajudin bin Ramli v Rego Multi-Trades Sdn Bhd* [2018] MLJU 147; [2018] 7 CLJ 197, CA (refd)

Legislation referred to

Companies Act 1948 [UK] s 199
B Companies Act 1965 (repealed by Companies Act 2016) ss 131(1), (5), (7B), 132, 132(1), (1A)
Contracts Act 1950 s 71

C **Appeal from:** *Aspire Summit Sdn Bhd v Desacorp Sdn Bhd and another case* [2021] MLJU 183 (High Court, Sibu)

Sim Hui Chuang (Reddi & Co Advocates) for the appellant.
Alvin Yong Sze Lung (with Shirleen Ong and Liew Sheau Kie) (Loke, King, Goh & Partners Advocates) for the respondent.

D

See Mee Chun JCA:

INTRODUCTION

E **[1]** In the High Court ('HC'), Aspire Summit Sdn Bhd ('Aspire') filed a claim against Desacorp Sdn Bhd ('Desacorp'). Desacorp filed a counterclaim against Aspire, Wong Hou Liang (Neil) and Kathryn Ma ('Kathryn') as representative of the estate of Wong Kie Nie ('WKN').

F **[2]** Another company, Demeter Resources Sdn Bhd ('Demeter') also filed a claim against Desacorp who similarly filed a counterclaim against Neil and Kathryn.

G **[3]** The HC claims were consolidated and heard together. The claims of Aspire and Demeter were allowed while the counterclaims of Desacorp were dismissed, leading to the appeals before us.

[4] Appeal 1799 is Desacorp's appeal against Aspire and its counterclaim.
H Appeal 1800 is Desacorp's appeal against Demeter and also its counterclaim. Both appeals were likewise consolidated and heard together.

[5] All references to enclosures are to Appeal 1799, unless otherwise
I indicated.

PARTIES

[6] Desacorp is a wholly owned subsidiary of WTK Realty since December 2009. WTK Realty is a company owned and controlled by members of the Wong family.

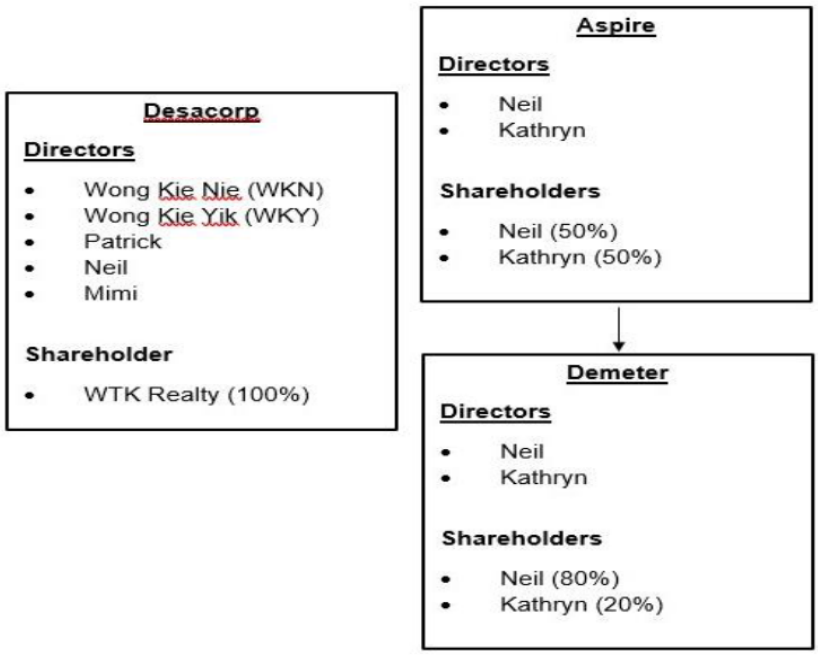
[7] At the material time, the directors of Desacorp were WKN, Neil, Mimi Wong (Mimi), Wong Kie Yik (WKY), who is WKN's brother and his son Patrick Wong (Patrick). The late WKN's family comprised of his wife Kathryn and two children, Neil and Mimi.

[8] The directors of Aspire are Neil and Kathryn and they each hold 50% of the shares.

[9] The directors of Demeter are Neil and Kathryn. Neil holds 80% of the shares with Kathryn holding the balance 20% shares.

[10] The shareholding and directorship of the three companies are as shown below:

(the remainder of this page is intentionally left blank)



BACKGROUND FACTS

[11] On or around February 2012, it is alleged that Neil took over the management of Desacorp without the prior consent/approval of the board of directors.

[12] On 10 April 2012, an agreement was entered into between Desacorp and Aspire (encl 87/45–68, the Aspire agreement). Aspire was appointed as the contractor to develop two parcels of Desacorp's land ('the land') as an oil palm plantation. The Aspire agreement was signed by Neil on behalf of Desacorp and Kathryn on behalf of Aspire. On 6 August 2013, Aspire issued a letter to terminate the Aspire agreement.

[13] On 31 July 2012, an agreement was entered into between Desacorp and Demeter (encl 87/69-80, the Demeter agreement). Demeter was appointed as a consultant to provide consultancy management services and harvesting operations for the land. The Demeter agreement was signed by Mimi and WKN on behalf of Desacorp and Neil and Kathryn on behalf of Demeter. On 7 August 2013 the Demeter agreement was terminated by Demeter.

[14] Aspire and Demeter then filed their HC claims for a declaration that the two agreements entered into were terminated, the recovery of monies for work performed pursuant to the two agreements and alternatively on *quantum meruit* pursuant to s 71 of Contracts Act 1950. Aspire's claim is for RM3,212,071,88 with interest while that of Demeter's is RM3,036,494.87 with interest.

[15] Desacorp disputed the claims and counterclaimed for a declaration that the Aspire and Demeter agreements were entered in breach of ss 131(1), (5), (7A), 132(1) and (1A) of the CA 1965 and an order that the agreements be rescinded and/or declared null and void.

[16] Desacorp further counterclaimed against Neil and Kathryn (as WKN's representative) for breach of fiduciary duty and statutory duties as directors of Desacorp and for a full account of all benefits, income and profits in connection with the action and breach of fiduciary duties.

[17] WKN passed away on 11 March 2013.

DECISION OF THE HC

[18] The grounds of the HCJ ('GOJ') are found in encl 105/24–59.

[19] The HCJ found that Neil and WKN had breached their statutory duty by failing to disclose their interest to the Board of Desacorp with regard to the Aspire and Demeter agreements prior to their execution (para 48). In para 47 it was stated that the duty to declare an interest in a meeting of the board of directors is strict and mandatory as stipulated under s 131(1) of Companies Act 1965 ('the CA 1965').

[20] It was further found that Neil and WKN had put themselves in a conflict of interest situation when entering into the Aspire and Demeter agreements. The Aspire agreement was signed by Neil (on behalf of Desacorp) and Kathryn (on behalf of Aspire). The Demeter agreement was signed by Mimi and WKN (on behalf of Desacorp) and Neil and Kathryn (on behalf of

Demeter). At para 51, the HCJ stated that it was obvious that both Neil and WKN have a direct or indirect interest in both agreements due to their family relationship.

[21] The HCJ then went on to find the following:

(a) since Desacorp had not taken any steps to invalidate or void the contract timeously or as soon as practicable after discovery of the agreements and further the undisputed fact concerning the visit of WKY at the plantation thereafter, it goes to show that there was no issue on the validity of the agreements, instead, it must be taken that the agreements had been ratified despite the non-disclosure of interest of interest which militates against them (para 59 GOJ); and

(b) it was his considered view that Desacorp should be estopped from challenging the validity of Aspire and Demeter agreements as evidently, contemporaneous documents have shown that WKY was aware that Aspire and Demeter were Desacorp's contractor and consultant throughout the material period (para 64 GOJ).

[22] On the respondent's claims, the HCJ took into consideration Desacorp's own documents such as the contractor's monthly progress claims, the summary of account prepared for Aspire and in relation to Demeter, the monthly billings (paras 83–85 GOJ).

[23] With regard to the counterclaim, it was essentially found that Neil and WKN had not breached their fiduciary duties nor commit any equitable fraud as the objective of improving the estate of Desacorp was always foremost in their minds.

[24] There was no wrongful termination as the termination was due to Desacorp's refusal to pay the outstanding amounts due to Aspire and Demeter.

OUR DECISION

[25] We do not intend to set out the respective submissions of the parties separately, but will where necessary, address them in the course of the decision.

The respondents' claims

[26] The submissions of the parties were very much focused on ss 131 and 132 of the CA 1965 and the other defences raised plus the issues of ratification and estoppel. However, we must not lose sight of the respondents' claims which are premised on the recovery of monies due from the performance of work on

the Aspire and Demeter agreements. If the claims are proven, we will then consider the defences raised.

[27] In respect of the claims under the Aspire and Demeter agreements, Ling Thien Kwong (PW12) gave evidence. His witness statement (WS) is in encl 23/8–80. He was the Group Senior Accounts Supervisor of GCH group.

[28] PW12 signed off on all the monthly invoices issued by Aspire to Desacorp for the work performed by Aspire on the oil palm plantation. The amount on each invoice was based on the work performed by Aspire's subcontractors as recorded in Desacorp's monthly progress claim and Desacorp's Certificate of Payment. The rate of payment for each type of work was provided in the Aspire agreement. Refer to Q&A 8 and 9 WS. There were also other payments made for and on behalf of Desacorp. The statement of account is in encl 73/120.

[29] Certificates of payment are in turn issued by Aspire to its subcontractors to verify that the work has been done and the amounts owning to them are accurate. PW12 signed the aforesaid certificates (Q&A 59A and 60). Payments are then made accordingly which can be seen from the HSBC's statement of accounts.

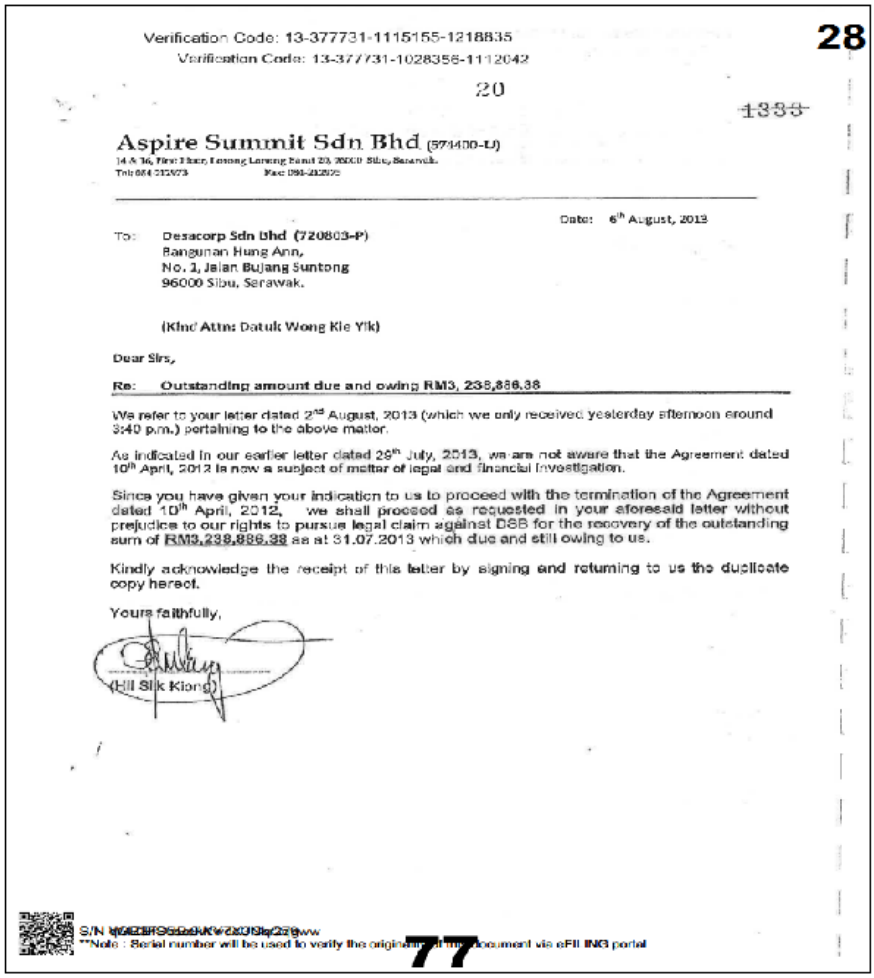
[30] With regard to the Demeter agreement, the management fee charged was as per the agreement. PW12 had similarly issued invoices on behalf of Demeter to Desacorp for management fees from July 2012 and the statement of accounts for the month as well. Refer to Q&A 190 and 195. We note the same is repeated for the months following. At Q&A 351, he sets out the total amount from Desacorp to Demeter as RM3,036,494.87 and at Table A to the WS the tabulation is shown with the references to supporting documents (encl 23/76–78).

[31] The evidence of PW12 shows that the invoices and statement of accounts issued to Desacorp were premised on the respective agreements. For the Aspire agreement, the rates payable are as stated in the Third Schedule and it depends on the nature of the work (encl 87/67–68). For the Demeter agreement, cl 6.1 provides a monthly fee of RM250,000 (encl 87/74).

[32] For the Aspire agreement, there are also certificates of payment and work completion checklist, an example of which can be found in encl 87/90–123 and an example of an invoice in p 124.

[33] In respect of the two agreements, it is not disputed that payments were made but were stopped upon the disputes arising. Hence this prompted Aspire and Demeter to issue their letters of termination.

[34] The Aspire termination is dated 6 August 2013 in encl 87/85 as below:



28

Verification Code: 13-377731-1115155-1218835
Verification Code: 13-377731-1028356-1112042

20

~~1333~~

Aspire Summit Sdn Bhd (574400-U)

14 A 16, First Floor, Lorong Lanang Kanan 23, 96000 Sibu, Sarawak.
Tel: 084 [illegible] Fax: 084-[illegible]

Date: 6th August, 2013

To: **Desacorp Sdn Bhd (720803-P)**
Bangunan Hung Ann,
No. 1, Jalan Bujang Suntong
96000 Sibu, Sarawak.

(Kind Attn: Datuk Wong Kie Yik)

Dear Sirs,

Re: Outstanding amount due and owing RM3, 238,886.38

We refer to your letter dated 2nd August, 2013 (which we only received yesterday afternoon around 3:40 p.m.) pertaining to the above matter.

As indicated in our earlier letter dated 25th July, 2013, we are not aware that the Agreement dated 10th April, 2012 is now a subject of matter of legal and financial investigation.

Since you have given your indication to us to proceed with the termination of the Agreement dated 10th April, 2012, we shall proceed as requested in your aforesaid letter without prejudice to our rights to pursue legal claim against DSB for the recovery of the outstanding sum of **RM3,238,886.38** as at 31.07.2013 which due and still owing to us.

Kindly acknowledge the receipt of this letter by signing and returning to us the duplicate copy hereof.

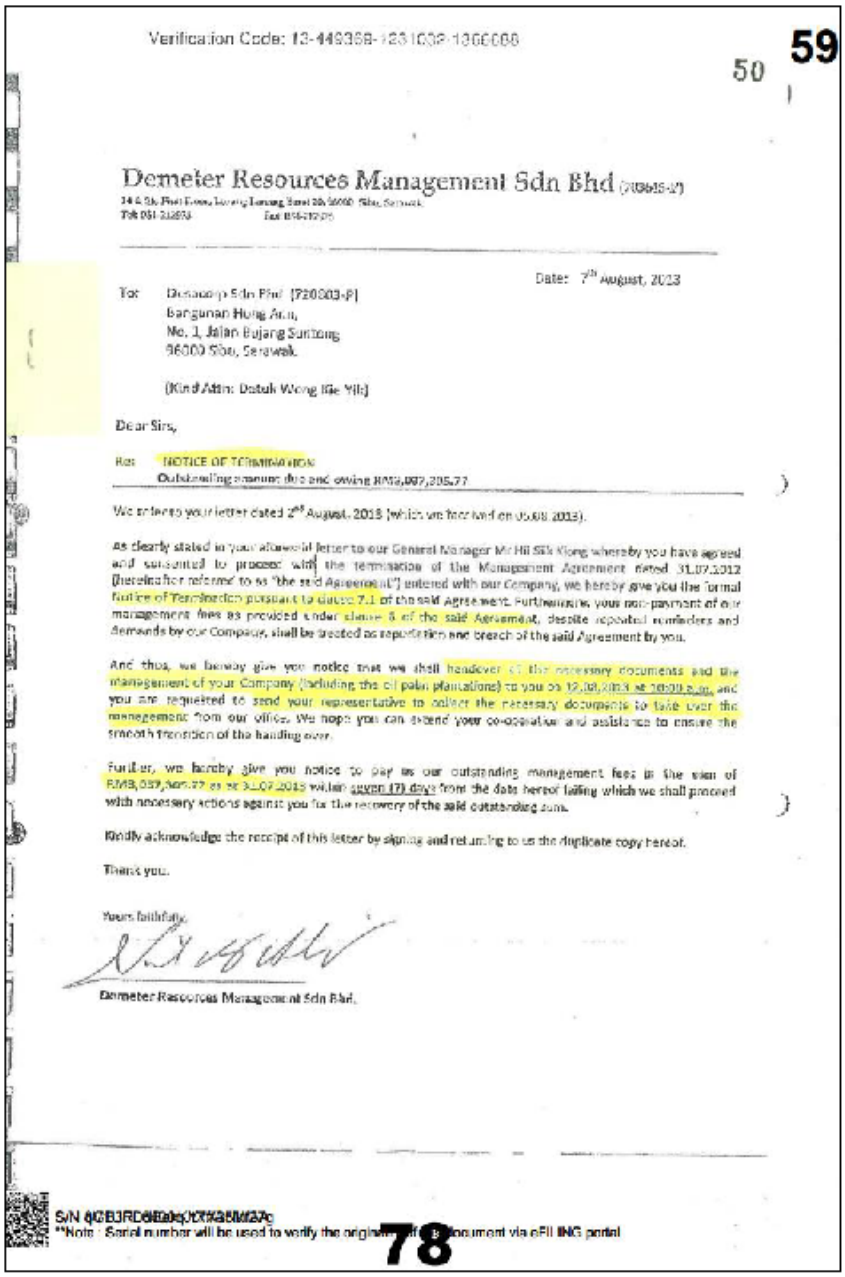
Yours faithfully,

(Hii Sik Kiong)

S/N [illegible]
**Note : Serial number will be used to verify the original [illegible] document via eFILING portal

77

[35] The Demeter termination is dated 7 August 2013 in encl 87/86 as below:



Verification Code: I3-446368-1231038-1000000

59

50

Demeter Resources Management Sdn Bhd (708615-V)

14 & 15, First Floor, Lorong Tanjung Datu 20, 96000 Sibu, Sarawak.
Tel: 084-312853 Fax: 084-312870

Date: 7th August, 2013

To: Dutaland Sdn Bhd (720003-P)
Bangunan Hung Ann,
No. 1, Jalan Bujang Suntong,
96000 Sibu, Sarawak.

(Kind Attn: Datuk Wong Ik Yii)

Dear Sirs,

Re: NOTICE OF TERMINATION
Outstanding amount due and owing RM3,887,205.77

We refer to your letter dated 2nd August, 2013 (which we received on 05.08.2013).

As clearly stated in your aforesaid letter to our General Manager Mr Hii Sik Kiong whereby you have agreed and consented to proceed with the termination of the Management Agreement dated 31.07.2012 (hereinafter referred to as "the said Agreement") entered with our Company, we hereby give you the formal notice of Termination pursuant to clause 7.1 of the said Agreement. Furthermore, your non-payment of our management fees as provided under clause 5 of the said Agreement, despite repeated reminders and demands by our Company, shall be treated as repudiation and breach of the said Agreement by you.

And thus, we hereby give you notice that we shall handover all the necessary documents and the management of your Company (including the oil palm plantations) to you on 12.08.2013 at 10:00 a.m. and you are requested to send your representative to deliver the necessary documents to take over the management from our office. We hope you can extend your co-operation and assistance to ensure the smooth transition of the handing over.

Further, we hereby give you notice to pay us our outstanding management fees in the sum of RM3,887,205.77 as at 31.07.2013 within seven (7) days from the date hereof failing which we shall proceed with necessary actions against you for the recovery of the said outstanding sum.

Kindly acknowledge the receipt of this letter by signing and returning to us the duplicate copy hereof.

Thank you.

Yours faithfully,

Demeter Resources Management Sdn Bhd.

S/N 4CB3RDeBdqXXX8MZAc
**Note : Serial number will be used to verify the original of this document via eFILING portal

78

A B C D E F G H I

[36] In the circumstances above, Aspire and Demeter had proven that work had been done and payment was not made leading to the termination. They were thus entitled to be paid their claims. From the submissions of Desacorp, it was not seriously challenging the amounts due and outstanding. It did contend that PW12 ought not to have issued the certificates of payment to the subcontractors, but by and by, and as noted earlier, it was disputing the validity of the agreements vis a vis ss 131 and 132 of the CA 1965.

BREACH OF S 131 OF THE CA 1965 BUT NOT S 132 OF THE CA

[37] The HC decision meant that although it was found that Neil and WKN had breached their fiduciary duties under s 131 of the CA 1965 in failing to disclose their interest and there was a conflict of interest situation, when the Aspire and Demeter agreements were entered into, nevertheless there was no breach of fiduciary duties under s 132 of the CA 1965.

[38] There was no appeal by Aspire, Demeter, Neil or Kathryn against that part of the finding of a breach of s 131 of the CA 1965 and that finding stands.

[39] Section 131(1) and (5) of the CA 1965 provides as follows:

> 131 Disclosure of interests in contracts, property, offices, etc.
>
> (1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to his knowledge, declare the nature of his interest at a meeting of the directors of the company.
>
> ...
>
> (5) Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.

[40] The authorities are clear that the duty to disclose an interest under s 131 of the CA 1965 is mandatory. For instance, in *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262; [1999] 7 CLJ 1, it was said at p 278 (MLJ); p 18 (CLJ) that 'such a declaration is mandatory'.

BREACH OF S 131 OF THE CA 1965 DOES NOT AUTOMATICALLY AMOUNT TO A BREACH OF S 132 OF THE CA

[41] It was submitted by Desacorp that it is not contending that a breach of s 131 of the CA 1965 is an automatic breach of s 132 but that s 131 is a breach of fiduciary duty on its own. That would indeed be a correct legal proposition.

[42] We need only to refer to an earlier decision of this court in *Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & Ors and other appeals* [2020] 3 MLJ 415 at p 445:

> [63] ... As for this case before us, we would agree with Golden's counsel that there is no such automatic effect that a breach of s 131 would follow that under s 132. In other words, a breach of the former would not automatically cause a breach of the latter provision.

[43] The relevant provisions of s 132 of the CA 1965 provide as follows:

> Section 132 As to the duty and liability of officers.
>
> (1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.
>
> (1A) A director of a company shall exercise reasonable care, skill and diligence with —
>
> (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
>
> (b) any additional knowledge, skill and experience which the director in fact has.

[44] We find that a breach of s 131 of the CA 1965 does not automatically amount to a breach of s 132. Both sections are separate and distinct relating to a director's statutory duties.

WHETHER THERE IS A BREACH OF S 132 OF THE CA 1965

[45] In *Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors* [1999] 5 MLJ 421 it was said in p 432 that in addition to the statutory impositions of s 132 of the CA 1965:

> ... a director is also in a position as a fiduciary of the company, being a person entrusted with the assets of the company and whose duty is to perform to the best interest of the company ...

This has been cited with approval in a decision of this court in *Tan Sri Dato' Tajudin bin Ramli v Rego Multi-Trades Sdn Bhd* [2018] MLJU 147; [2018] 7 CLJ 197 at para 31 p 208.

[46] Other than a few other cases cited, Desacorp had also referred to the *Annotated Companies Act 2016* as s 132 of the CA 1965 is now also to be found in Companies Act 2016:

> [214.05] The directors must act in what they honestly believe to be the interests of the company. They must exercise their powers for the purpose for which they were conferred. They cannot allow themselves to be placed in a situation where the exercise of their powers for the company's benefit is in any way fettered. And they

A must not allow themselves to be placed in a situation where their duties and personal interest conflict or where there is a real possibility of such a conflict arising. This last rule has various aspects. It means, for example, that a director entering into a contract with the company without making proper disclosure is liable to account for any profits made and the contract is voidable at the option of the company. It
B also means that the director is precluded from turning to his own advantage, information, property or opportunities that belong to the company, or which present themselves to him by virtue of his position in the company.

[47] The complaint of Desacorp was that the above authorities had not been
C considered by the HCJ. We are of the considered opinion that the above passages state principles of law which we do not disagree with. What we are concerned with is the application of such principles to the facts of the appeal especially as there is no automatic breach of s 132 of the CA 1965 when s 131 of the CA is breached. Hence for instance, non-disclosure or a conflict of
D interest which was found to be a breach of s 131 of the CA cannot, without more, amount to a breach of fiduciary duty under s 132 of the CA.

RATIFICATION

E **[48]** We will first deal with ratification and estoppel and only then with what were the alleged breaches of fiduciary duties.

[49] We have earlier set out why the HCJ had allowed the claims despite the breach of s 131 of the CA 1965. Essentially, it was because there had been
F ratification and estoppel.

[50] The HCJ found that as Desacorp had not taken steps to invalidate the two agreements upon discovery of the same, it is taken that the agreements had been ratified.

G

[51] We begin with the legal principle that the failure of Neil and WKN to disclose their interest in the agreements render the agreements voidable at the option of Desacorp. This is made clear by s 131(7B) of the CA 1965 as follows:

H Section 131 Disclosure of interests in contracts, property, offices, etc.

...

(7B) Where a contract or proposed contract is entered into in contravention of this section, the contract or proposed contract shall be voidable at the instance of the company except if it is in favour of any person dealing with the company for any
I valuable consideration and without any actual notice of the contravention.

[52] We were also referred to *Hely-Hutchinson v Brayhead Ltd and another* [1967] 3 All ER 98 where an issue there concerned non-disclosure which was said to be a failure to comply with s 199 of the Companies Act 1948

and article 99 of Brayhead's articles of association. The relevant provisions are to be found at the foot of pp 98 and 99. A

[53] At pp 103 and 106 the following were said:

> ... Non-dislosure does not render the contract void or nullity. It renders the contract voidable at the instance of the company and make the director accountable for any secret profit which he has made. B
>
> ...
>
> The normal consequences which follow from a contract made by a person in such a fiduciary position are that the contract may be voidable at the instance of, in this case, the company and that in certain cases a director may be called on to account for profits which he has made out of the transaction. C

[54] The words 'voidable at the instance of the company' in s 131(7B) of the CA 1965 require Desacorp to void the Aspire and Demeter agreements. However, it elected not to do so, such that the agreements are taken to be ratified. We say so for the following reasons. D

[55] The evidence shows there was a memo dated 1 February 2012 (encl 94/249) issued by Neil under the WTK Group of Companies' letterhead to Janice Ting and copied to WKY that Golden Cash Harvest Sdn Bhd (GCH) would be taking over the management of Desacorp's estate operations. It was Janice's evidence that she knew GCH was a company controlled and managed by Neil and Kathryn and that at the date of the memo, Neil was not yet a director of Desacorp. Refer to encl 94/250. E F

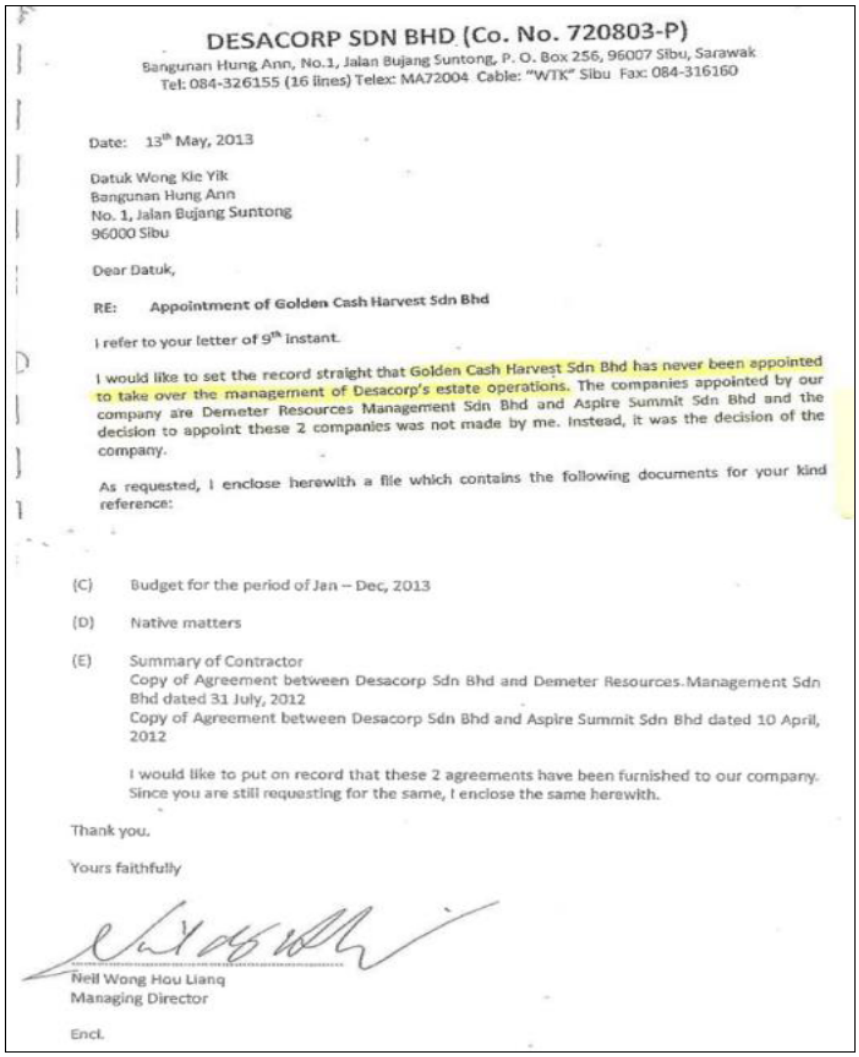
[56] Although the memo indicated that GCH would be taking over, it is to be noted that Aspire and Demeter are companies under GCH group of companies. At para 93 of the GOJ, this was said: G

> [93] Although NW's memo dated 1 February 2012 only mentioned of GCH as the entity which would take over the management of Desacorp's plantation, at the risk of being overly repetitive, it is again stressed that the personality involved in Wong's companies are blood-related and the kind of business practices within WTK and GCH Group of Companies were rather less formality without much reliance on written instruction and most often by way verbal communication. H

[57] The next event was WKY writing to Neil on 9 May 2013 requesting for copies of 'contract(s) or agreement(s) which sets out all the terms and conditions of GCH's appointment including but not limited to the scope of work and renumeration and payment to GCH' (encl 87/81–82). I

[58] WKY's letter would also show he had acted on the basis that GCH, a company owned and controlled by Neil, is managing Desacorp's oil palm plantation.

[59] Neil's reply dated 13 May 2013 can be seen in encl 87/83–84. The relevant part is reproduced as below:



DESACORP SDN BHD (Co. No. 720803-P)
Bangunan Hung Ann, No.1, Jalan Bujang Suntong, P. O. Box 256, 96007 Sibu, Sarawak
Tel: 084-326155 (16 lines) Telex: MA72004 Cable: "WTK" Sibu Fax: 084-316160

Date: 13th May, 2013

Datuk Wong Kie Yik
Bangunan Hung Ann
No. 1, Jalan Bujang Suntong
96000 Sibu

Dear Datuk,

RE: **Appointment of Golden Cash Harvest Sdn Bhd**

I refer to your letter of 9th instant.

I would like to set the record straight that Golden Cash Harvest Sdn Bhd has never been appointed to take over the management of Desacorp's estate operations. The companies appointed by our company are Demeter Resources Management Sdn Bhd and Aspire Summit Sdn Bhd and the decision to appoint these 2 companies was not made by me. Instead, it was the decision of the company.

As requested, I enclose herewith a file which contains the following documents for your kind reference:

(C) Budget for the period of Jan – Dec, 2013

(D) Native matters

(E) Summary of Contractor
Copy of Agreement between Desacorp Sdn Bhd and Demeter Resources Management Sdn Bhd dated 31 July, 2012
Copy of Agreement between Desacorp Sdn Bhd and Aspire Summit Sdn Bhd dated 10 April, 2012

I would like to put on record that these 2 agreements have been furnished to our company. Since you are still requesting for the same, I enclose the same herewith.

Thank you.

Yours faithfully

Neil Wong Hou Lianq
Managing Director

Encl.

[60] From Neil's reply, when the Aspire and Demeter agreements were provided, it can be said that WKY would have known of Neil's and WKN's interests in the two agreements, by 13 May 2013, which ought to have prompted some action.

[61] There was no action towards voiding the two agreements. Not only that, it is not disputed that soon after, WKY had visited Desacorp's oil palm plantation in July 2013. In PW7's supplementary witness statement at Q & A200 (encl 22/42), this was said:

> Q200: When did Datuk Wong Kie Yik visit Desacorp's oil plantation?
>
> A: Sometime in July 2013, Datuk Wong Kie Yik visited the oil plantation in July 2013, with Anthony Lee, Mr Ang Meng Urn and I were at the management office when we met with Datuk Wong Kie Yik and Anthony Lee. I then drove him around Desacorp's oil palm plantation, in a four-wheel drive vehicle, to show him the work we have done to the oil palm plantation. Datuk Wong Kie Yik took photos, with his phone camera, of the oil palm plantation and commented in Foochow that he was satisfied with the condition of the oil palm plantation.

[62] In cross-examination (encl 11/92), PW7 said:

> Q: Refer to Q & A200 of WS-PW7 (1) line 10–11. You said that Datuk Wong communicated in Foo Chow. What did he say exactly?
>
> A: When he saw our work done, he feel happy and say we did a good job.
>
> Q: To whom did he say that to?
>
> A: To me.

PW7's evidence as above would show that WKY was satisfied with the condition of the plantation.

[63] The HCJ said in para 56 of GOJ that 'This indicates that Desacorp had evinced no intention to terminate the agreements and business went on as usual'. We agree with this finding.

[64] It was contended by Desacorp that WKY had by letter dated 6 June 2013 (encl 106/249) informed PW4 that the legality of the two agreements would be looked into apart from a due diligence and audit exercise to be proposed at the next Board meeting. Further, the Board had appointed Ferrier Hodgson to look into the validity of the two agreements after its meeting on 19 July 2013.

[65] We find no merit in these contentions. This is because it is not Desacorp's case they had insufficient knowledge to elect whether or not to void the two agreements. The knowledge of Neil's and WKN's interests was staring at it and WKY. Desacorp ought to have acted to void what was considered to be disadvantageous agreements. In any event, the Preliminary Findings Report dated 29 November 2013 prepared by Ferrier Hodgson (encl 106/262–319) at p 276 could only say:

> In view of the above, we advise that the Board to seek legal advice on whether WHL, Mimi and WKN may have breached their fiduciary duties under common law

A and/or pursuant to the Companies Act 1965 and if so, what are the appropriate legal remedies that may be available to the Company including any basis to terminate or rescind the Contracts and/or claim for any losses that may have been suffered by the Company.

B **[66]** As it turned out, before the above Report was completed, Aspire had given its notice of intention to proceed with termination dated 6 August 2013 and Demeter had terminated by letter dated 7 August 2013.

ESTOPPEL

C

[67] Other than the above, we were referred to documents which were said to show that Desacorp and its directors had actual knowledge that Aspire and Demeter were the contractors of Desacorp. These documents were drawdown letters and cheques.

D

[68] The drawdown letters were to OCBC for a period of eight months from 20 July 2012 to 19 March 2013 and signed by WKY. These letters are in encl 94/251–255. The list of suppliers which includes Aspire and Demeter, with job descriptions, payment voucher number and amount due is attached to the letters. These were also signed by WKY and are in encl 94/256–257 reproduced as below:

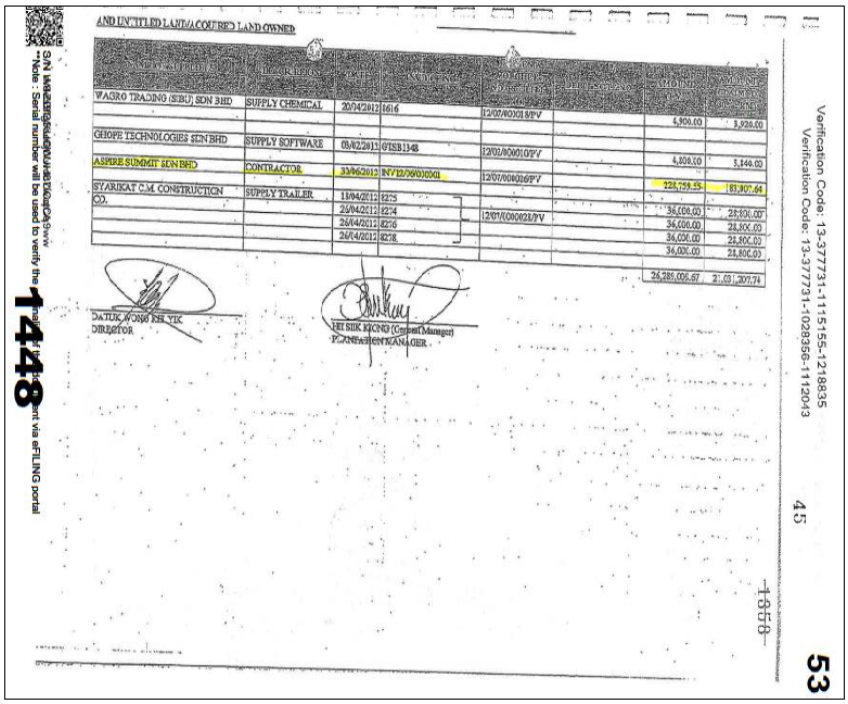
E

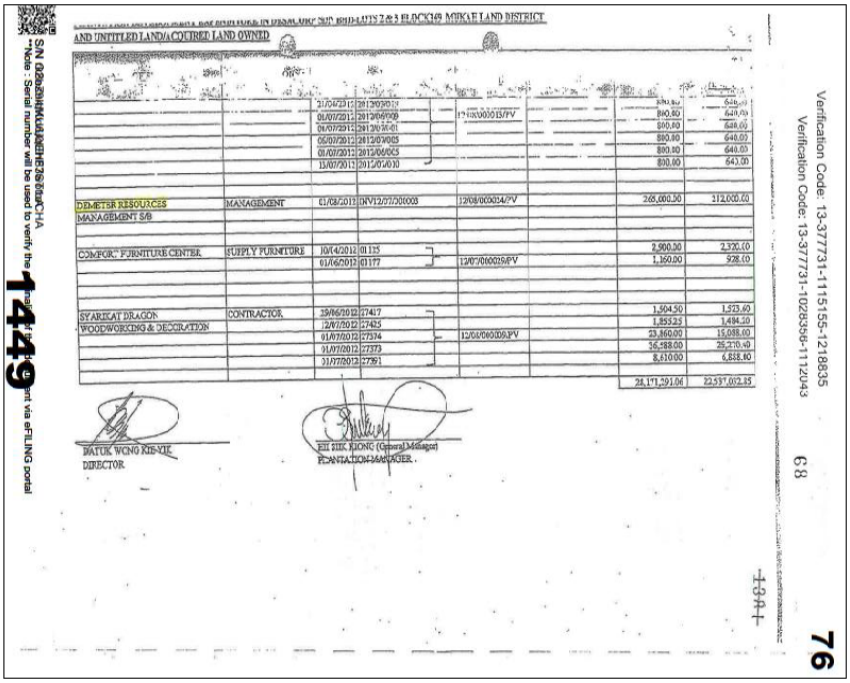
F

G

H

I


AND UNTITLED LAND/ACQUIRED LAND OWNED
WAGRO TRADING (SEBU) SDN BHD
SUPPLY CHEMICAL
20/04/2012
1616
12/02/000018/PV
4,900.00
3,920.00
GEOPE TECHNOLOGIES SDN BHD
SUPPLY SOFTWARE
05/02/2013
GTSB1348
12/02/000107/PV
4,300.00
3,440.00
ASPIRE SUMMIT SDN BHD
CONTRACTOR
33/06/2012
NV12/06030001
12/07/000026/PV
228,759.55
183,307.64
STARIKAT C.M. CONSTRUCTION CO.
SUPPLY TRAILER
18/04/2012
8275
25/04/2012
8254
26/04/2012
8276
26/04/2012
8258
12/07/000021/PV
36,000.00
28,800.00
36,000.00
28,800.00
36,000.00
28,800.00
36,000.00
28,800.00
26,285,005.67
21,03 ,207.74
DATUK WONG KEE YIK
DIRECTOR
HII SIIK KIONG (Central Manager)
PLANTATION MANAGER
S/N: MW2xxxx



[69] These letters cannot be dismissed by saying that the names of Aspire and Demeter were buried within the pages of creditors. These point to knowledge of both companies as the contractors of Desacorp.

[70] It was also PW4's evidence he had explained to WKY that Aspire and Demeter are included in the letters as creditors. His re-examination at encl 9/84–86 on this is as follows:

> Q: It was put to you that KY did not go through the list of creditors when he signed all the letters and attachments to OCBC at pages 46–146 of Bundle B2. You also disagree, when put to you, that WKY was never briefed about each creditor's name on the list and that you never highlighted to KY that Aspire Summit Sdn Bhd and Demeter was named as one of the creditors. Can you explain why you disagree? (see NOP page 418 lines 2–5, 7–10, 12–15)
>
> A: The court can refer to Bundle B2 page 23–45. It was a letter from Desacorp Sdn Bhd to OCBC Bank dated 20.7.2012. I refer to page 46–68 letter from Desacorp Sdn Bhd to OCBC Bank dated 27.9.2012. I refer to page 69–94, it was a letter dated 16.11.2012 letter from Desacorp Sdn Bhd to OCBC Bank. I refer to page

A 95–120, it was a letter from Desacorp Sdn Bhd to OCBC Bank dated 25.1.2013. I refer to page 121–146, it was a letter from Desacorp Sdn Bhd to OCBC Bank dated 19.3.2013. I brought all these letters and documents personally to Wong Kie Yik's office and I further explained to Mr. Wong Kie Yik with regards to who is their creditors and suppliers. I further explained to Datuk Wong Kie Yik Aspire Summit Sdn Bhd and Demeter Resources Management are include as a creditor. Aspire Summit Sdn Bhd and Demeter Resources only take partial payment from what is stated in the document. Datuk Wong Kie Yik read through these documents and he then signed all these documents in front of me.

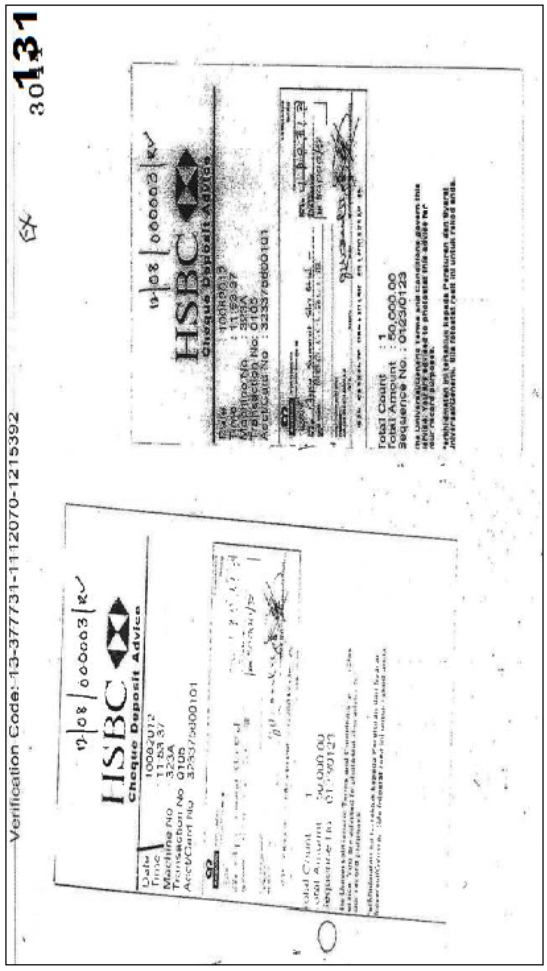
B

C **[71]** Enclosure 94/258 next shows a cheque dated 18 July 2012, signed by WKY and his wife, Judy Lau who is not a director or shareholder of Desacorp. The cheque was for a payment of RM50,000 made to Aspire:

D

E

F



G

H

I

[72] There were also other instances, which pre-dates the two agreements, where WKY and PW had dealt with Aspire and Demeter with various other companies within WTK Group. This was when WKY and Patrick were co-signatories or had separately signed cheques for Aspire and Demeter. These documents are found in encl 94/145–248. These documents show that WKY, Patrick, Aspire and Demeter are no stranger to each other.

[73] Under the circumstances, we agree that Desacorp is estopped from challenging the validity of the Aspire and Demeter agreements when it was aware of the agreements early on. This knowledge pre-dates 13 May 2013 when WKY had requested for and was provided copies of the Aspire and Demeter agreements.

ASPIRE'S 25% HIGHER CONTRACT RATE

[74] It was contended by Desacorp that soon after the Aspire agreement was entered into, a contractor Menyan Enterprise (Menyan) was terminated. Aspire then re-appointed Menyan as a subcontractor at a contract rate that was 25% higher than the contract rates charged by Desacorp's former contractors. Another subcontractor, Fhung Seng Company (Fhung Seng) was also appointed at the higher 25% contract rate. Reliance was placed on the evidence of DW4 (Andrew Heng from Ferrier Hodgson), PW4, PW7, and PW12 on the higher contract rate. It was also said that Neil, PW4 and PW12 were the persons involved in determining the contract rates as per PW4's evidence.

[75] It was then submitted that it was in the best interests of Desacorp to keep its costs low and there was no commercial or logical reason to terminate Menyan and then reappoint it. These would amount to Neil breaching his fiduciary duties. Further, the contract rates were not negotiated by the board and only by Neil and his team. All these ultimately meant that Desacorp had to bear an additional cost of RM1,008,863pa.

[76] On the re-appointment of Menyan, PW4 had explained as follows at encl 100/16–17:

> Q: You testified earlier that you have reason to reappoint Menyan Enterprise after you terminated their services. Can you tell us the reason why? (see NOP page 428 26 lines 14–20)
>
> A: The Menyan owner's father is a long service Camp Manager at WTK group of companies. His request to WKN and WKY give his son one more chance to be a subcontractors to work in Desacorp Plantation. And then the late Datuk Wong Kie Nai and WKY told me to re-engage Menyan Enterprise as our subcontractor. But I told him their performance have to reach to our company requirements.

We find this to be a reasonable explanation and there really was no sinister reason behind it.

A [77] On the contract rates, it was also explained by PW4 in encl 94/292:

> Q: You stated that you negotiated for Aspire Summit on the contract rates, can you tell us how you had come up with the contract rates? (see NOP page 305 lines 13–23)
>
> B A: I do the market survey and compare their rates to ours and then I will decide the rate. And then I come up with this 3rd schedule which appeared at page 23–24 of Bundle B3.

[78] PW8 (Charles Chang, Plantation Advisor) had given evidence in encl 94/293–294:

C

> Q: Can you explain to the court why you give your answer in Q&A29 of WS-PW8, that the contract rates in 2 pages ie pages 23 to 24 of bundle B3 that the contract rates in these 2 pages are fair and are more towards the lowest side in terms of price during that period?
>
> D A: Yes that is the market rates during that period of time in year 2012.

[79] Given that there was no evidence from Desacorp to challenge the evidence that these were then the prevailing market rates, we find that Neil and WKN did not breach their fiduciary duties.

E

DEMETER'S MARKED UP MANAGEMENT FEES

[80] It was next contended that Desacorp had to pay RM250,000 per month for the monthly management fees instead of RM50,000 from October 2012 onwards. Particular reference was made to DW4's evidence the fees were not commercially driven and not commercially viable.

F

[81] It was not disputed that this was indeed the management fee. Be that as it may, we find that the scope of work was different. We were referred to an earlier agreement between Desacorp and one WTK Management Services Berhad (WTK Management) entered on 1 July 2011 in encl 106/83–84. The management services provided by WTK Management shows the following:

G

WHEREBY IT IS AGREED as follows:

H

1. The company shall act as an administration and a shared cost centre for the Group covering:-
    a. Human Resources;
    b. System support, ie Accounting, EDP, Forestry, Shipping, Marketing and Auditing;

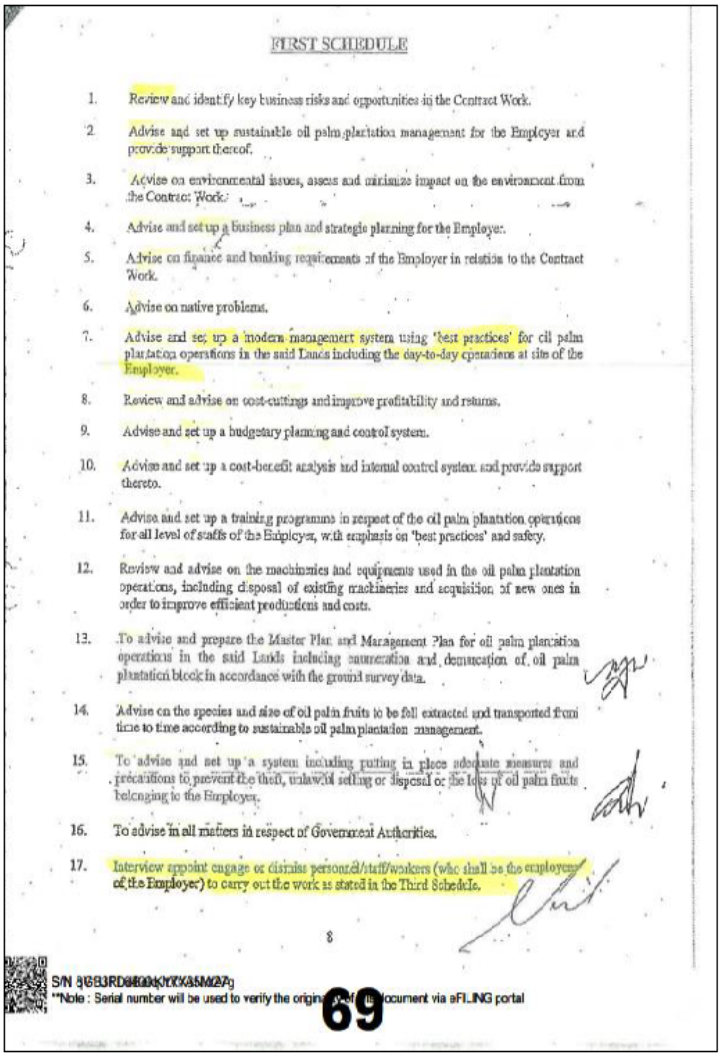
I

    c. Reception including telecommunication support;
    d. Secretarial service;
    e. Office administration; &

f. Other social welfare matters including donations.

2. The administration centre is responsible for review of salaries, bonus and other staff related welfare matters and expenses.'

[82] Next is the Demeter agreement where cl 3.1 provides that Demeter's responsibilities shall include the duties and powers set out in the First Schedule. The First Schedule in encl 87/77 is reproduced below:



FIRST SCHEDULE

1. Review and identify key business risks and opportunities in the Contract Work.
2. Advise and set up sustainable oil palm plantation management for the Employer and provide support thereof.
3. Advise on environmental issues, assess and minimize impact on the environment from the Contract Work.
4. Advise and set up a business plan and strategic planning for the Employer.
5. Advise on finance and banking requirements of the Employer in relation to the Contract Work.
6. Advise on native problems.
7. Advise and set up a modern management system using 'best practices' for oil palm plantation operations in the said Lands including the day-to-day operations at site of the Employer.
8. Review and advise on cost-cuttings and improve profitability and returns.
9. Advise and set up a budgetary planning and control system.
10. Advise and set up a cost-benefit analysis and internal control system and provide support thereto.
11. Advise and set up a training programme in respect of the oil palm plantation operations for all level of staffs of the Employer, with emphasis on 'best practices' and safety.
12. Review and advise on the machineries and equipments used in the oil palm plantation operations, including disposal of existing machineries and acquisition of new ones in order to improve efficient productions and costs.
13. To advise and prepare the Master Plan and Management Plan for oil palm plantation operations in the said Lands including enumeration and demarcation of oil palm plantation block in accordance with the ground survey data.
14. Advise on the species and size of oil palm fruits to be fell extracted and transported from time to time according to sustainable oil palm plantation management.
15. To advise and set up a system including putting in place adequate measures and precautions to prevent the theft, unlawful selling or disposal of the fresh oil palm fruits belonging to the Employer.
16. To advise in all matters in respect of Government Authorities.
17. Interview appoint engage or dismiss personnel/staff/workers (who shall be the employees of the Employer) to carry out the work as stated in the Third Schedule.

8

S/N 3GB3RD8B0KXXX5M2AG
**Note : Serial number will be used to verify the original document via eFILING portal

69

[83] This would indeed show the different and extensive management services to be provided by Demeter as compared to that of WTK Management which was essentially that of an administration and shared cost centre. One cannot compare apples to oranges.

[84] PW4 had also explained the basis of the RM45 per hectare as being premised on market rate as follows in encl 94/291:

> Q: At page 373 of NOP you mentioned that the management fees of Demeter Resources of RM185,000.00 was counted based on planted areas of oil palm trees which is 4000 plus hectares with a rate of RM45.00 per hectare. What is your basis for saying that the rate is RM 45.00 per hectare?
>
> A: It was based on the market price.

[85] There was also no evidence otherwise by Desacorp on the market rate. We therefore do not find this to be a breach of directors' fiduciary duties.

ADDITIONAL COSTS

[86] It was next submitted that the higher contract rate in the Aspire agreement and the marked up management fee in the Demeter agreement led to higher costs. This in turn resulted in Desacorp incurring significant losses amounting to RM155,663 for the Financial Year (FY) 2012 and RM2,116,619 for FY 2013. This contrasts to the profit of RM506,040 for FY 2011.

[87] Given our finding above that the higher contract rate and management fee had been sufficiently explained, we find that the additional costs similarly cannot amount to a breach of fiduciary duty.

[88] In any event, PW12 has explained that the losses were due to lower selling price of fresh fruit brunches (FBB) per meter tonne and the increase of cultivation expenses due to the large amounts of improvement work. Refer to encl 106/194 and 233. This was accepted by the HCJ as per paragraph 78 GOJ and we find no good reason to depart from this.

CONDITION OF THE OIL PALM PLANTATION

[89] The HCJ had relied on the reports of PW8 and Piong Sim that the oil palm plantation 'was not in the best of shape in the first quarter of 2012'. We are unable to accept Piong Sim's report as he was not called to give evidence.

[90] However, PW8 did give evidence. He visited the plantation four times in March, April, June and December 2012. For each visit, he prepared a Visiting Report.

[91] The first Visiting Report is for the period 21 March 2012 to 29 March 2012 (encl 94/259–269). At p 262, this was noted:

> The estate had been manage not up to the plantation industry standard, such as

– Weeds control — at mature or immature area are in very poor condition.

– Rats damage — at block N12 and N13 (immature area) have been damage badly.

– Palms pruning at mature area — most of the mature area never carried out the pruning operation since day one.

– Unplanted area — most of the peat area at every phase are not planted, for example at phase 8 division 1 have about 104.6 ha not planted (map attached).

[92] The second Visiting Report is for the period 21 April 2012 to 23 April 2012 (encl 94/272–274). Here, it was noted at p 273 that compaction work was in progress and that under the heading pruning was stated 'the block has been cleared'.

[93] The third Visiting Report is for the period 23 June 2012 to 24 June 2012 (encl 94/275–279). This time, rat control was under control, compaction work had been satisfactorily carried out (p 277), and the same too with pruning and road resurfacing (p 278).

[94] The fourth Visiting Report is for 28 December 2012 (encl 94/280–284). The weeding was satisfactory, the supply palms were in progress and carried out satisfactorily as was the new planting area and palm moulding.

[95] It was said that the photographs provided in the report of PW8 were not from Desacorp's plantation but from the Delta-Pelita Sebakong Sdn Bhd area. This was by reference to DW3's evidence at encl 106/22 as follows:

> Further, based on Mr Piong Sim's report, the photos provided were all taken in the Delta-Pelita Sebakong Sdn Bhd's area and not from Desacorp's plantation. Hence, it is not fair to use another company's photographs to make such comments. With the technology nowadays, the photos should have GPS coordinates to verify the location.

[96] This evidence shows that the photographs referred to were in relation to the report of Piong Sim and not PW8. The Q&A earlier on was in reference to Piong Sim's report. This is evident from Q&A 9 and 10 (encl 106/21):

> Q9: Kindly refer to pgs 1587–1588 of Bundle B6 [Exhibit PB6] Part C Volume 4 of the bundle of documents filed by Stephen Robert & Wong Advocates in the Aspire action. What is this document?
>
> A9: This is planting advisor's report dated 12–4–2012 on site visit to the Desacorp's and Delta-Pelita Sebakong Sdn Bhd on 9th and 10th of April 2012 prepared by Piong Sim.
>
> Q10: What do you have to say about this document?

A10: The Report make some comments in respect of Desacorp's plantation which are inaccurate.

[97] In relation to the condition just about before or shortly after Aspire took over, PW8 did admit in the first report, there were no photographs to show the area with very high rat population, the unplanted area and plants looking weak and short of nutrients. However, there were other photographs to match the condition that was described. This report and the subsequent reports do show the condition before Aspire came into the picture and thereafter. This was what was meant by the HCJ in para 82 of GOJ of the gradual improvements.

[98] On the issue of PW8's appointment not being approved by Desacorp, this does not affect the validity of the contents of the reports. This is a matter to be dealt with between PW8 and Desacorp.

[99] Desacorp had referred to DW3's evidence that during the time when WKN was in charge of the management of Desacorp, his team had proposed remedial and mitigation measures which were accepted and carried out by the management. The relevant evidence referred to are as in encl 106/16, 17 and 20:

Q6: What was the condition of Desacorp's plantation in December 2009?

A6: Generally, there were some problems with Desacorp's plantation during that period. I have actually prepared a report on this dated20-12-2013 which can be seen at pages 1-11 if B(D) (Vol 10). Essentially, from 2010-2012, about 8 survey work and verification exercises were conducted by my team and I on the plantation of Desacorp. Based on those field verification exercises, we managed to check, verify, detect and highlight certain critical shortcomings of the plantation and had also proposed certain remedial and mitigation measures.

...

Q8: Were your recommendations accepted and carried out by the management?

A8: Yes.

[100] For context, we think it is necessary to also set out the shortcomings and measures to address them. This is set out in Q&A 7 (encl 106/17–20):

Q7: What were these shortcomings and what measures did you and your team take to address these shortcomings?

A7: There are essentially 7 areas which are set out in my report.

(a) Close Planting

...

(b) Road Construction

...

(c) Drainage system

...

(d) Timber bridges construction

...

(e) Improvement to earth filling work

...

(f) Clearing/stacking/underbrushing

...

(g) Peat compaction

...

Essentially, when we took over the management of Desacorp's plantations from Mr. Khiu, the previous owner, we faced countless problems and challenges to rectify and improve its development, field maintenance and manuring works. However, all these works need to be done gradually and systematically stretched over a reasonable period of time. The condition of Desacorp's plantation when we took over cannot be improved overnight.

[101] We note that there is an acknowledgment of 'some problems with Desacorp's plantation' and that the condition of the plantation 'when we took over cannot be improved overnight'. As can be seen in Q&A 7 there were seven areas of shortcomings. Although it was said the recommendations were accepted and carried out by the management, there was no evidence to that effect. The report meant by DW3 was in fact, a memo dated 20 December 2013 from DW3 to Janice Ting (encl 106/320–328). It did set out the recommendations but it is not a record of what was done by Desacorp under the then management.

[102] We find that DW3's evidence only showed there were seven areas of problems or shortcomings with the plantation but did not show that these had been overcome.

[103] Against this backdrop is the visit by WKY in July 2013 where he was satisfied on the work done to improve the condition of the plantation.

NO BREACH OF S 132 OF THE CA 1965

[104] The above acts namely higher contract rate, marked up management fee, and additional costs do not constitute a breach of director's fiduciary duty under s 132 of the CA 1965. It was said in para 95 GOJ 'that the objective of improving the estate of Desacorp had always been at the forefront of both WKN and Neil's minds and not as a medium of profiteering'.

[105] It was contended by Desacorp that there was no evidence as to WKN or Neil's intention and/or state of mind. We would say that the objective can still be as ascertained where the condition of the oil palm plantation showed a need for the Aspire and Demeter agreements to be entered into such that the agreements were in the best interests of Desacorp. Explanations too had been proffered on the basis of the higher contract and management fees, which had been accepted by us.

SUBCONTRACTING

[106] Another issue raised was that Aspire had subcontracted the agreement to Menyan and Fhung Seng without the prior written permission of Desacorp. This court is mindful of cl 1(g) of the Aspire agreement that the contract is not to be subcontracted without the prior written permission of Desacorp. The HCJ was prepared to accept Aspire's evidence that verbal approval had been obtained from WKY, WKN and Neil (para 74 GOJ).

[107] However, we find that the larger issue ought to be the consequence of such subcontracting without prior written approval. In this regard, cl 1(k) (encl 87/47) provides as follows:

> (k) In the event of the Contractor is breach of the aforesaid terms and conditions and notwithstanding the Termination Clause under Clause 4 in this agreement, the Company shall have the rights at any time by giving immediate notice in writing sent by registered post to the claims whatsoever against the Company but without prejudice to the company right to sue against the Contractor for whatever loss or damage suffered.

This means that any breach of the provision in cl 1(g) entitles Desacorp to terminate the agreement, which it did not. Instead it chose the route of ss 131 and 132 of the CA 1965.

THE ENTERING INTO THE AGREEMENTS WITHOUT THE FORMAL APPROVAL OF DESACORP'S BOARD

[108] The fact that there was no formal approval from Desacorp's Board does not negate the fact that Desacorp, WKY and Patrick were aware of the Aspire and Demeter agreements and the interest of Neil and WKN interest. Further, we had earlier found that there was ratification and estoppel.

COUNTERCLAIM

[109] As we find that the respondents have proved their claims; that there was no breach of s 132 of the CA 1965; that there had been ratification and that estoppel applied, the appellants' counterclaims ought to fail.

CONCLUSION

[110] For all the above reasons, we find that there is no appealable error which warrants our appellate intervention. The appeals are therefore dismissed with costs. After hearing parties on the issue of costs, we ordered the appellant to pay costs of RM30,000 for each appeal to the respondent subject to allocatur.

Appeals dismissed.

Reported by Nabilah Syahida Abdullah Salleh